APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 81-1349

UNITED STATES OF AMERICA, Appellee, vs. JESUS ANTONIO TRUJILLO-GARCIA, Appellant.

No. 81-1447

UNITED STATES OF AMERICA, Appellee, vs. HORACIO RAUL ESTRADA-ELIAS, Appellant.

No. 81-1685

UNITED STATES OF AMERICA, Appellee, vs. MIGUEL FRANCO-GOMEZ, Appellant.

DC No. CR 80-726

Appeal from the United States District Court for the Southern District of California, Earl B. Gilliam, District Judge, Presiding.

Argued and submitted July 9, 1982.

BEFORE: GOODWIN, NELSON, Circuit Judges, and SMITH,* District Judge

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*Honorable Russell Evans Smith, United States District Judge for the District of Montana, sitting by designation.

[FILED AUGUST 16, 1982]

Estrada-Elias appeals his sentence after a plea of guilty to possession of cocaine with intent to distribute. Franco-Gomez appeals his conviction by the court of conspiracy to distribute cocaine and three counts of possession with intent to distribute cocaine. Trujillo-Garcia appeals his conviction by the court of conspiracy to distribute cocaine and possession with intent to distribute cocaine and heroin.

We affirm the convictions of Estrada-Elias and Franco-Gomez. We reverse the confiction of Trujillo-Garcia because the evidence against him was obtained in a search and seizure which violated his Fourth Amendment rights.

FACTS

A DEA confidential informant contacted Estrada-Elias to buy cocaine. Estrada-Elias was himself a former DEA informant. On October 3, 1980, in the presence of the informant, Estrada-Elias received a delivery of approximately one pound of cocaine from Franco-Gomez at Estrada-Elias' place of business. (Franco-Gomez was followed and subsequently arrested on the freeway; his car contained approximately 1 and ½ kilos of cocaine.)

Followed by DEA agents, Estrada-Elias took the pound of cocaine in a brown paper bag to an apartment rented by Trujillo-Garcia and Aguirre, another codefendant who was acquitted. Estrada-Elias remained inside the apartment for a few minutes, was seen holding a smaller package and talking briefly with Trujillo-Garcia in the doorway, and then proceeded to a rendezvous with the informant a few blocks away, where he was arrested by Agent Gorman

after he had sold an ounce of cocaine.

At approximately the same time, federal agents entered the Trujillo-Garcia/Aguirre apartment without a warrant and made a sweep through its rooms. They observed a quantity of cocaine in a bowl in Aguirre's bedroom. With this and other information, the agents obtained a search warrant several hours later which resulted in the seizure of approximately ½ kilo of cocaine, 4 ounces of heroin, and "drug paraphernalia" (scales, blender, etc.). The only evidence found in Trujillo-Garcia's bedroom was a residue of cocaine in the closet.

After Estrada-Elias was arrested, he told Agent Gorman that he had delivered a pound of cocaine to Trujillo-Garcia and that customers were coming to look at it. The parties dispute whether these statements were known tb the agents who made the warrantless entry of Trujillo-Garcia's apartment.

Franco-Gomez stated that he and Estrada-Elias were partners, and that at the time of his arrest he was on his way to a meeting with Estrada-Elias to deliver the rest of the cocaine.

ESTRADA-ELIAS' ISSUES

After several days of a court trial, Estrada-Elias pled guilty to possession with intent to distribute. He had been previously convicted of a federal narcotics offense. After a sentencing hearing lasting several days, he was sentenced to ten years with a special parole term of six years. (This sentence is well within the maximum sentence under the statute.)

He now asserts that the trial court erred in considering hearsay supplied by a police officer concerning drug dealings in San Jose that were unconnected with the transactions

in issue in this case. Inasmuch as the sentencing judge announced that he was paying no attention to this information, there is no ground for objection to the information coming to the court's attention.

Estrada-Elias makes another argument that he was denied the effective assistance of counsel because his attorney failed to present a defense of entrapment. Estrada-Elias contends that he became involved in the criminal activities to which he ultimately pled guilty only because he was trying to protect himself and his family from the consequences of his former activities as a DEA informant.

There was no evidence of entrapment sufficient to require reasonably competent counsel to assert it as a defense. Any such argument was appropriate only as a plea for leniency in sentencing, and it was presented as such. Estrada-Elias has failed to make a showing that he did not receive reasonably competent and effective representation. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) *cert. denied*, 440 U.S. 974 (1979).

FRANCO-GOMEZ'S ISSUE

Franco-Gomez argues that he moved for severance before trial, but his motion was not ruled on until after trial. He contends that his right to cross-examination was infringed by the introduction of statements by co-defendant Estrada-Elias which incriminated him.

The government points out that the hearing in this case was a combined motion hearing and court trial, and that the court specifically refused to admit any hearsay statements by Estrada-Elias against the other defendants.

The court stated upon finding Franco-Gomez guilty, "I guess I have granted a severance." There was neither error nor prejudice in this regard.

Franco-Gomez also argues that there was no evidence that he knew Trujillo-Garcia or had been to his apartment, and that he could not be convicted of aiding and abetting Trujillo-Garcia's possession with intent to distribute. He contends that there was no showing that the cocaine found in the dish in the apartment had any connection with him, and that he had already been convicted of conspiracy with regard to that substance.

In reviewing the sufficiency of the evidence, this court must view the evidence in the light most favorable to the government and draw all reasonable inferences supporting the conviction; the verdict must be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). In this case, the stipulation signed by Franco-Gomez and the observations of the agents clearly link him to the cocaine found in the bedroom of the Trujillo-Garcia apartment. It is not necessary that an aider-abetter know all the details of the crime or all the persons perpetrating the crime. *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982). There was sufficient evidence to support the verdict.

Franco-Gomez also argues that he was denied the effective assistance of counsel because a codefendant, Estrada-Elias, was a government informant during trial at the same time that he was a part of the defense team. However, he fails to support this conclusory allegation with any proof that Estrada-Elias was acting as an informant at the time of the sale of cocaine or at the time of trial, and the record indicates otherwise. Moreover, the issue was not

raised at trial, in spite of counsel's knowledge of Estrada-Elias' previous status as a DEA informant.

We affirm Franco-Gomez's conviction.[1]

TRUJILLO-GARCIA'S ISSUES

Agents entered and "secured" Trujillo-Garcia's apartment without a warrant at 3:10 p.m. A search warrant was obtained more than four hours later.

We note that the Supreme Court has recently re-emphasized the transcendent privacy interest in private residences. *Payton v. New York*, 445 U.S. 573 (1980). We start with the premise that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347 (1967). The government here relies on the "exigent circumstances" exception. *See McDonald v. United States*, 335 U.S. 451 (1948). When police officers, acting on probable cause and in good faith, reasonably believe from the totality of the circumstances that (a) evidence or contraband will be destroyed or (b) the nature of the crime or character of the suspect(s) pose a risk of danger to the arresting officer(s) or third persons, we have held that exigent cir-

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[1] Franco-Gomez also attempts to challenge the search of Trujillo-Garcia's apartment. He concedes that on the facts of this case he lacks a legitimate expectation of privacy in Trujillo-Garcia's apartment under federal law. Because we are bound by the decisions of the Supreme Court, we do not address his arguments as to the correctness of those decisions.

cumstances justify a warrantless entry, search or seizure of the premises. *United States v. Kunkler*, No. 80-1710 (9th Cir. June 8, 1982); *United States v. Gardner*, 627 F.2d 906, 910-12 (9th Cir. 1980); *United States v. Fulton*, 549 F.2d 1325, 1327 (9th Cir. 1977); *United States v. McLaughlin*, 525 F.2d 517, 520-21 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976); *United States v. Curzi*, 498 F.2d 30, 35-36 (9th Cir. 1974).

The burden is on the government to show the existence of exigent circumstances by a preponderance of the evidence. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970), and *United States v. Matlock*, 415 U.S. 164, 177-78, n. 14 (1974). Because the government failed to meet its burden in this case, we reverse.[2]

A warrantless entry cannot be justified solely because the agents knew or suspected that there was contraband on the premises. *United States v. Allard*, 600 F.2d 1301, 1303-4 (9th Cir. 1979). The agents who effected the warrantless entry testified that they did so to continue the investigation, to ensure the safety of themselves and bystanders, and to preserve evidence. The government argues that Trujillo-Garcia might somehow have learned of the arrests of Franco-Gomez and Estrada-Elias and proceeded to destroy the cocaine. However, the government fails to provide any evidence to support this speculation. *See United States v. Allard*, 600 F.2d at 1304, (officers had no facts upon which to base a reasonable belief that the occupant knew of his accomplice's arrest or had been instructed to destroy the

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[2] In reviewing the trial court's ruling on the motion to suppress, we defer to the trial court's findings of historical fact, but we must make an independent determination whether constitutional requirements have been met. *Ker v. California*, 374 U.S. 23, 34 (1963).

contraband).

The government also argues that Estrada-Elias' statements after arrest provided a reasonable basis for concern that customers might arrive or that Estrada-Elias' failure to reappear might alert Trujillo-Garcia and cause him to destroy the cocaine. However, the government failed to show that Estrada-Elias' statements were made before the warrantless entry or that they were known to the agents who made the entry (or to their superior who ordered it). The government contends that knowledge of Estrada-Elias' statements should be imputed to the agents who entered Trujillo-Garcia's apartment because they were working as a team with the agents who arrested Estrada-Elias. The district court apparently agreed with this interpretation of *United States v. Bernard*, 623 F.2d 551 (9th Cir. 1979), which held that for purposes of determining probable cause to arrest, the arresting agent could rely on the opinions of other agents in addition to his personal knowledge. In *Bernard*, however, the other agent's opinion was actually communicated to the agent who authorized the arrest. In the case at bar, the government failed to show such a communication between the agent who arrested Estrada-Elias and the agents who entered Trujillo-Garcia's apartment without a warrant.

There was no evidence that Trujillo-Garcia was armed or dangerous. No one had entered or left the apartment before the agents entered. *Cf. United States v. Curran*, 498 F.2d 30, and *United States v. McLaughlin*, 525 F.2d 517. There was no immediate threat that Franco-Gomez or Estrada-Elias would be able to telephone Trujillo-Garcia. *Cf. United States v. Flickinger*, 573 F.2d 1349 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978).

The circumstances were not sufficiently exigent to

justify a warrantless entry in this case. The evidence should have been suppressed.[3] Because we cannot say that the admission of the evidence was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18 (1967), we reverse the conviction of Trujillo-Garcia.[4]

The judgments against Estrada-Elias and Franco-Gomez are affirmed. The judgment against Trujillo-Garcia is reversed.

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[3]The subsequent issuance of a search warrant does not purge the taint under *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980).

[4]Because we reverse on this ground, we do not reach the question of the sufficiency of the evidence to sustain Trujillo-Garcia's conviction.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the State of California, County of Riverside, employed in the County of Riverside, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on OCTOBER 13, 1982, I served the within PETITION FOR WRIT OF CERTIORARI (Miguel Franco-Gomez v. United States of America) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
FOR THE SOUTHER DISTRICT OF CALIFORNIA
940 Front Street
San Diego, California 92189

And, further, that I served the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT a copy thereof at:

POST OFFICE BOX 547
SAN FRANCISCO, CALIFORNIA 94101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 13, 1982, at CORONA, CALIFORNIA.

_____

D. A. Standefer

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